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Collective Rights Management: An unwritten agreement and the amount of remuneration (Latvia).

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"The Radio Company cannot be declared guilty for breach of copyright (illegal use of musical works), although no written agreement has been concluded. In Latvia, criteria for stipulation of the amount of remuneration are not given in the Copyright Law."

In 2006 the *Autorties?bu un komunic?šan?s konsult?ciju a?ent?ra / Latvijas Autoru apvien?ba*, the Copyright and Communication Consulting Agency/Latvian Authors Association), also know in Latvia with its abbreviation – "AKKA/LAA" (further: Collective Rights Management Organization) brought a claim against one Radio Company in Latvia asking the court to rule that the Radio Company has violated copyright law in using musical works in its programs without paying for them in full since the year 1999. The Radio Company brought a counter claim, asking the court to recognize conclusion of the agreement with the Collective Rights Management Organization and asking the court to fix the amount of remuneration to be paid to the Collective Rights Management Organization, namely, 1,8 % from the income of the Radio Company acquired from developing radio programs using the musical works.

It should be noted that the Radio Company paid the Collective Rights Management Organization remuneration for usage of the musical works in its programs upon its own discretion since 1999, and that there was an agreement concluded between the Radio Company and the Collective Rights Management Organization on 17 September 2001. That agreement expired on 31 December 2002. In the negotiation process of a new contract the parties also involved a public organization *Latvijas Raidorganiz?ciju asoci?cija* (Association of Broadcasting Organizations of Latvia). The negotiations were however unsuccessfully and the contract was not concluded, as parties could not reach an agreement on the exact amount of remuneration.

In 2007 the first instance court reached its judgment and satisfied both the claim and counterclaim in part. The appellate court ruled that the Radio Company had to pay remuneration to the Collective Rights Management Organization for the usage of musical works since 1999 and that there was a contract concluded between the parties. The court, upon its own discretion, decided that 3 % from the income of the Radio Company had to be paid as remuneration by the Radio

Company to the Collective Rights Management Organization.

Both parties submitted a cassation claim and on 21 December 2011, the Senate of the Supreme Court of the Republic of Latvia (further: the Court) ruled that, although the Collective Rights Management Organization and the Radio Company had not signed a new licensing contract on the use of musical works after expiry of the previous contract, their actual relationship shows existence of an agreement (payment of remuneration from one side and receipt of such payments without any objections on the other side, as well as no objections from the side of the Collective Rights Management Organization on usage of the musical works by the Radio Company in its programs in the period from expiry of the previous contract in 2003 till 2006, when the claim was brought to the court).

The fact that theCopyright Law requires a written form of the license agreement cannot change the conclusion that the agreement has been concluded. In accordance with Article1485 of Civil Law, when participants to a transaction, which requires to be in a written form, agree on all the essential provisions, either party may ask the other to prepare the relevant deed (in written form).

Besides, Article 1488 (2) of Civil Law states that partly fulfilled transactions are in force, even when a written form has not followed. The Court also rejected the view of the Collective Rights Management Organization that the amount of remuneration is an essential provision of the contract, thus without agreement on that part, the contract cannot be regarded as concluded. The Court grounded its finding on Article 41 of the Copyright Law, stating that in case the amount of remuneration in the license agreement is not stipulated, it is the court, exercising its own discretion, that determines the amount of remuneration. Thus, the Copyright Law allows existence of license agreements, where the amount of remuneration is not stipulated. Consequently, the Court approved that the contract between the Collective Rights Management Organization and the Radio Company had been concluded in its negotiated wording of 19 April 2005 and approved the court's right to set the amount of remuneration upon its own discretion, as the parties to the contract were not able to reach an agreement in this respect.

The case is interesting from the point of view of what is to be regarded as fair remuneration to be paid for the usage of an author's work? In Latvia, the Copyright Law does not state any criteria for stipulation of the amount of remuneration, thus it is Article 5 of the Civil Law, stating that, where a matter is required to be decided in the discretion of a court, the judge shall decide the matter in accordance with a sense of justice and the general principles of law, which helps in resolving the dispute. The Court also stated that any conclusions reached by the Competition Council regarding justification of the amount of remuneration set by the Collective Rights Management Organization, does not influence the court's own discretion to stipulate the amount of fair remuneration in the present case.

The Court also approved finding of the appellate court that the Radio Company cannot be declared guilty for breach of copyright (illegal use of musical works). Although no written agreement has been concluded, a contractual relationship between the Collective Rights Management Organization did exist and thus violation of Copyright Law cannot be found in the actions of the Radio Company.

Nevertheless, the Court revoked the judgment of the appellation court in part, with regard to the amount of remuneration, on grounds of procedural violations. By setting the amount of remuneration 3 % from the income of the Radio Company, as the Radio Company had not

submitted evidence on the amount of its income from developing radio programs using the musical works, the appellation court violated the Article 93 (4) of the Civil Procedure Law, which states that in case the court finds that one of the parties has not submitted evidence to the court approving its statements, the court is obliged to notify that to the relevant party and if necessary set a term for submission of such evidence. Thus the Court revoked the judgment of the appellation court in part setting the amount of remuneration 3 % from the income of the Radio Company and send the case for new trial in this respect.

A full summary of this case will be added to the Kluwer IP Cases Database (www.KluwerIPCases.com).

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